United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1229

To be argued by
BART M. SCHWARTZ

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1229

UNITED STATES OF AMERICA,
Appellee,

—v.—

CHARLES GOLDBERG and
POCONO INTERNATIONAL CORPORATION,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Charles Goldberg and Pocono International Corporation ("PIC") appeal from judgments of conviction entered on May 19, 1975, in the United States District Court for the Southern District of New York after a two week trial before the Honorable Charles L. Brieant, Jr., United States District Judge, and a jury.

Indictment 73 Cr. 630, filed on June 27, 1973, contained 42 counts and charged mail fraud in violation of 18 U.S.C. § 1341 (Counts 1 through 15), land sales fraud in violation of 15 U.S.C. § 1703(a)(2)(B) (Counts 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 40, 41, 42), and, in violation of 15 U.S.C. § 1703(a)(1), the sale of unregistered land (Counts 16, 18, 20, 22, 24, 26, 28, 30, 32,

34, 36, 38), which, in seven instances, was effected without timely delivery of a Property Report as required (Counts 16, 20, 22, 24, 26, 28, 36).

Trial against Goldberg and PIC commenced June 3, 1974, and ended on June 14, 1974 when the jury found each defendant guilty on seven counts of mail fraud, seven counts of land sales fraud and six counts of sale of unregistered land. In addition to this PIC was also found guilty of selling three lots without timely delivery of the property report, these charges being, however, part of the six counts of sale of unregistered land.*

Defendants' post trial motions for a new trial or judgment of acquital, which were addressed *solely* to the fourteen fraud counts, were denied on December 30, 1974, renewed on January 17, 1975, and again denied on April 25, 1975.

On May 19, 1975, Judge Brieant sentenced Goldberg to concurrent 18 month terms of imprisonment on each of the six counts charging the sale of unregistered land and suspended sentence against him on the remaining counts. Goldberg was also placed on probation for a period of four years with a special condition of probation that Goldberg use his best efforts to have PIC pay its total $37,500.00 fine.** The fine was to be paid by July 3, 1975. The fine remains unpaid.

Goldberg is enlarged on bail pending appeal.

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* The defendants were convicted of all counts submitted to the jury. The other counts were dismissed with the Government's consent at the close of the Government's case.

** The fine was imposed as follows:

$1,000 on ct. 2, $5,000 on cts. 18 & 19—non cumulative to each other but cumulative to remaining cts.; $1,000 on ct. 7, $5,000 on cts. 26 & 27—non cumulative to each other

[Footnote continued on following page]

Statement of Facts

The Government's Case

(A) Background

In late 1969 or early 1970 PIC was organized to acquire and develop a tract of land of about 820 acres in the Poconos in Penn Forest Township, Carbon County, Pennsylvania, known as Hickory Run Forest ("HRF"). Charles Goldberg was an incorporator and principal shareholder of PIC, owning 50% of the stock at first and subsequently 90%. He was originally the president of PIC and at all relevant times was an officer and principal of the company (Tr. 1039-1054).*

Development of HRF was planned to occur piecemeal; the eight numbered sections** of the 820 acres were mapped, cleared and sold off in three stages, with sections 7 and 8 being developed first, then sections 5 and 6, and finally sections 1 through 4 (Tr. 1049). The prices for lots ranged from $1,895 to $40,000 (GX 4).

Defendants employed agents for various aspects of the development. The engineering work was done by Ebeco Corp., whose principal engineer on the job was Joseph

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but cumulative to the prior cts.; $1,000 on ct. 8, $5,000 on ct. 41—non cumulative to each other but cumulative to the prior cts.; $1,000 on ct. 4, $5,000 on cts. 20 & 21—non cumulative to each other but cumulative to the prior cts.; $1,000 on ct. 9, $5,000 on ct. 29—non cumulative to each other but cumulative to prior cts.; $1,000 on ct. 11, $5,000 on cts. 30 & 31— non cumulative to each other but cumulative to prior cts.; $1,000 on ct. 12, $5,000 on cts. 32 & 33—non cumulative to each other but cumulative to the prior cts., $2,500 on ct. 16, cumulative.

* "Tr." refers to the trial transcript; "GX" to Government Exhibit; and "Def. Br." to defendants' Brief.

** Three lettered sections, A, B and C, were developed later and are not involved in this case.

Michel (Tr. 1058-1059). The promotion and selling aspects, during 1972, were handled by an exclusive selling agent, Sellamerica, Inc., whose principal officer was Ric Ebenstein, also known as Ric of the Poconos (Tr. 1045-1046, 1050). By July, 1972, Ebenstein had also become an officer of Pocono, and by September, 1972, shortly after all the sales charged in the indictment had occurred, Goldberg owned 50% of the stock of Sellamerica (Tr. 1044-52). The first two registrations with the Interstate Land Sales Office of the U.S. Department of Housing and Urban Development ("HUD") were handled by an attorney. Norman Failla, a broker hired by Goldberg, did the HUD filing in 1972 for sections 1-4. Failla had previously handled the New Jersey and New York State filings required by local law for HRF sections (Tr. 106-113).

An effective registration with HUD pursuant to the Interstate Land Sales Full Disclosure Act is a prerequisite for interstate sales. The purpose of such registration is to correct abuses and sharp practices in the land sales field, restore investor confidence and protect small investors who were subject to high-pressure sale techniques.* Registration requires the filing of a detailed description of the land being sold, called a Statement of Record, with various exhibits attached (Tr. 4). After the filing, it is HUD's procedure either to accept the Statement of Record or to note deficiencies, and when any such deficiencies are corrected, the filing becomes "effective" and interstate sales are permitted.** If HUD does not inform the registrant of any deficiencies within 30 days, the filing

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* 113 Cong. Rec. 315 (Jan. 12, 1967) (remarks of Senator Williams).

** HUD does not independently investigate the claims in the Statement of Record but relies upon information furnished and documents submitted by the developer.

becomes effective by operation of law. The HUD filings and effective dates for HRF sections 1-8 were as follows:

HRF Section	*Statement of Record Filed*	*Statement of Record Effective*
7 - 8	May 20, 1971	May 27, 1971
5 - 6	March 12, 1972	May 10, 1972
1 - 4	July 18, 1972	August 17, 1972 *

The six counts against each defendant involving sale of unregistered land related to sales of lots in sections 1-4 prior to August 17, 1972 when the filing became effective as a matter of law.** PIC was also charged with failure to provide three of those six buyers with a Property Report prior to or at the time of sale.*** The Property Report is in effect a prospectus, containing a condensed, discursive, version of the Statement of Record and supporting exhibits filed with HUD and is designed to give the buyer clear and accurate information on the condition of the land he is buying (Tr. 9-10). Goldberg was familiar with the contents of the Statements of Record and the Property Reports (Tr. 1065).

The fraud counts stemmed from the sale of six lots located in sections 1-4 of HRF, and an additional lot in

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* The Statement of Record for sections 1-4 was filed by Norman Failla on behalf of PIC on July 18, 1972. Apparently through negligence, HUD did not respond until the 30th day thereafter, mailing its letter listing 13 deficiencies on August 17, so that the letter reached PIC sometime after the 30 days. Thus the Statement of Record in fact became effective on August 17, though neither HUD nor the defendants were aware of this at the time and neither treated it as effective in their subsequent negotiations.

** Counts 16, 18, 20, 26, 30 and 32.

*** The three buyers were those of the lots involved in counts 16, 20 and 26.

sections 5-6.* The fraud, in essence, was in defendants' representations, both written and oral, that sewage disposal for the vacation homes to be built at HRF could be by a septic tank system which would be approved by the local township officials. Each of these seven lots sold became the basis for two counts of fraud, one under the mail fraud statute and one under the Interstate Land Sales Full Disclosure Act.**

(B) The six sales prior to Effective HUD registration and the failure to provide a property report in three of the six sales.

It was undisputed that six purchasers of lots in sections 1-4 named in the indictment purchased land from PIC prior to August 17—the date on which the pertinent Statement of Record filed with HUD became effective (Tr. 1156). Indeed, four of the six sales occurred even prior to the *filing* of the Statement of Record on July 18.***

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* Counts 2, 4, 7, 8, 9, 11, 12, 19, 21, 27, 29, 31, 33 and 41.

** Defendants' "Statement of the Case" contains several factual inaccuracies which do not merit extensive refutation. For instance, on page 4 of their brief, the following errors occur: Defendants claim (a) that the original 42 counts were based on sales to 16 purchasers, whereas in fact there were 15; (b) that the Government was "forced to dismiss 18 counts when only six purchasers appeared", whereas in fact seven purchasers appeared, and the testimony of an eighth was stipulated to, and 16 fraud counts were dismissed not because witnesses failed to appear but because of the Court's ruling on sub-surface sand filters (Tr. 1097-1098, 1108) (see, *infra*, p. 11); (c) On page 5, ¶ 1, defendants state that seven non-registration counts went to the jury, whereas in fact there were only six (Tr. 1095-1096); (d) On page 6, ¶ 3, defendants refer to false representations about sections 7-8 of HRF, when in fact the fraudulent sales were in sections 1-6. This penchant for misstatement and inaccuracy carries over to defendants' creative and imaginative interpretation of the record. See, *e.g.*, Point IV, *infra*.

*** Jordan, June 4 (Count 16); Delgado, June 25 (Count 18); Arella, July 8 (Count 20); DiMeglio, July 3 (Count 26); Cancro, July 18 (Count 30); and Perri, July 18 (Count 32).

The sales technique was similar for each purchaser. The prospective customer, in each instance a resident of New York State, was contacted by a salesman of Sellamerica, PIC's exclusive selling agent, by telephone or through a house visit. The prospective customer was invited to visit the site in the Poconos, given road maps with directions and thereafter drove to HRF on interstate roads. After being shown the available lots by salesmen of Sellamerica,* and having decided to buy, the customer signed an agreement of purchase with PIC, made a cash or check down payment, and signed a loan agreement with provisions for monthly payments for the balance of the purchase price to be paid to a New Jersey or Pennsylvania bank. The monthly payments were made by checks mailed to the bank, and the deeds were mailed to the purchasers from Pennsylvania. On several occasions, additional interstate telephone calls or correspondence occurred to complete the sales arrangements (Tr. 807-897, 946-966, 1080-1081).

Three purchasers, Jordan, DiMeglio and Arella, had never been shown any Property Report prior to or at the time they signed the agreements of purchase (Tr. 862-863, 876-878, 963) and three other buyers in sections 1-4, who did receive a document purporting to be a Property Report from the sales agents, were in fact given a report relating to other sections of HRF which had been registered earlier (GX 45E, 53B, 54B).

PIC had sold approximately 115 lots not charged in the indictment in sections 1-4 between April, 1972, and the date of filing, plus an additional 10 sales between July 18 and August 17, 1972 (Tr. 1081). This meant that over half of the entire inventory of lots in sections 1-4 were sold well prior to the HUD *filing*. In fact, it was con-

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* The testimony established that Sellamerica also used classic "bait and switch" techniques (Tr. 809-811, 842-843, 859-860).

ceded that the sales effort for sections 1-4 commenced as early as April, 1972 (Tr. 1156).

Goldberg was the chief operating officer of PIC and he personally handled correspondence relating to the six sales in sections 1-4 charged in the indictment, as well as other sales (GX 52E, 56E, 45D, 46B, 76). Goldberg dealt directly with and negotiated for the work to be performed by the engineers. Ebeco, in preparing the plot map for sections 1-4 in anticipation of the HUD filing. This work was commenced at the end of March, 1972, and only completed on May 8, 1972 (Tr. 407-8), after the sales efforts began. Goldberg procured the maps for Failla, for his HUD filing for sections 1-4, and arranged for other necessary documentation to be provided by other contractors to Failla (Tr. 113-117). Failla got the check for the HUD filing fee from Goldberg, telling Goldberg what it was for, and Failla had to go to Goldberg to get the signature of PIC's then president, Poritzky, on the Statement of Record (Tr. 360-361).

HUD, Failla and the defendants continued long after August 17, 1972 to treat the filing as ineffective because of many deficiencies. Failla testified that, both by phone and in person, he discussed the deficiencies with Goldberg and had to obtain through him much of the data from the attorney or others to correct the deficiencies (Tr. 132-150, 355). Correspondence between PIC and Failla and HUD about the deficiencies went through Goldberg's office (GX 15, 16, 18-24).

(C) The Fraud

The defendants represented that purchasers of lots in the Hickory Run Forest development would be able to dispose of household waste and sewage by constructing on-site septic systems which would be approved by the

Township of Penn Forest.* The representation was made in several ways. First, it appeared in the Statement of Record for sections 7-8 which was signed by Goldberg, and incorporated without change in the Statements of Record for sections 5-6 and sections 1-4; and it appeared again in the Property Report prepared for distribution to potential buyers.** Finally, the representation was made orally to three of the seven purchasers (Counts 4, 11, 12 and 21, 31, 33), by salesmen of PIC's agent, Sellamerica, who falsely told them there would be no trouble at all with putting in septic tanks on their lots (Tr. 962, 843, 812, 830-31).

Prior to these representations, defendants' engineer, Michel, had studied the HRF area, made only six percolation tests *** of the soil over the entire 820 acres, and consulted the reports of the federal Soil Conservation Service ("SCS") on HRF. The SCS reports (GX 30, 31 and 32) concluded that, for on-site sewage disposal, the soils' limitations were "severe"—because of slow permeability, shallowness and stoniness in sections 7 and 8 and because of these factors plus seasonal high water table in sections 1-6.

Michel estimated on May 1, 1971, that of the total 529 acres of HRF for which lots were planned, 309 acres could take septic tanks with the standard disposal system of a tile field or seepage bed, close to 20% might need septic tanks with either the standard field or a sand filter

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* In truth, one out of every five such lots required exotic sewage disposal systems, approval for which could be granted only by the State of Pennsylvania's Department of Environmental Resources, as opposed to any township official. See, *infra*, pp. 26-29.

** The relevant portions of the Statement of Record and Property Report are set out in Government's Appendix hereto, pp. A-1-2.

*** A percolation test is conducted by boring a hole in the ground, filling it with water and determining the rate at which the water drops.

bed depending on individual analysis, and another 20% would need aerobic tanks (GX 60, Def. App. A175). Michel specifically told Goldberg that about 20% of the lots to be developed had severe limitations and would need aerobic tanks or evapo-transpiration beds.* He also told Goldberg that any on-lot sewage system at HRF would have to be "designed to meet some of the problem conditions that existed there like seasonal high water, stoniness, or low percolation rate" (Tr. 416) and that the corrective systems required State approval.

Dr. Glade Loughry, an agronomist and Chief of the Soil Science Unit at the Pennsylvania Department of Environmental Resources ("DER") and former employee of SCS, testified that the SCS mappings for Penn Forest Township were probably 85% accurate (Tr. 685-687) and that they revealed that a substantial portion of HRF was comprised of soils with characteristics such as impermeable layers, high water tables, steep slopes or similar defects, and which therefore were classified since at least 1970 by DER as generally unsuitable for septic tanks with standard subsurface drainage systems (Tr. 687-694).

Goldberg knew of the official position of the DER in 1971 or early 1972 that the HRF soils had severe limitations for conventional subsurface sewage disposal (Tr. 1061-1065).

A DER soil scientist personally examined the soils on the lots which were the bases of the fraud counts in the indictment, and from his description of the soil profiles Dr. Loughry concluded that each lot fell within DER's classification of unsuitable for conventional subsurface

* Michel recanted and denied at trial that he told Goldberg the precise percentages quoted in the text. His Grand Jury testimony of May 15, 1973, in which he testified he gave this information to Goldberg in 1971, was thereupon offered and received as affirmative evidence (Tr. 424-426).

sewage disposal, because there was a high water table on the lot (*i.e.*, a water table within four feet or less of the surface of the soil) (Tr. 697-709). Therefore, an aerobic tank or a septic tank with any of the below ground disposal systems was not useable on any of the seven lots, and if any system could be used at all, it would be only one which the local Township did not have the authority to approve (Tr. 705-06, 712-714).

Local township sewage enforcement officers did not in practice issue permits for anything other than a "standard" septic system consisting of a septic tank with a disposal area consisting of an underground tile field, seepage bed (or pit) or a serial distribution system. This was in accord with DER policy that local officials were not to issue permits for systems such as a septic tank with sand filter bed (either below ground, or above as a "turkey mound"), or an aerobic tank (Tr. 569-570, 785-787, 899-900, 906, 967-991). This DER policy was set forth in the DER manual and in instructions to local sewage enforcement officers, including the Penn Forest Township sewage officer (Tr. 569, 991-8, GX 74). This policy and practice was clearly understood by defendants' engineer Michel (Tr. 568-570), who told Goldberg in early May, 1971 that the corrective systems he was suggesting for HRF needed State approval (Tr. 416-417, 421).

Before the case was submitted to the jury, the Court ruled that the practice of requiring DER approval for the subsurface sand filter type of system was not based on any duly promulgated regulation having the force of law (Tr. 937-941). The Court ruled, however, that this practice as to above ground sand filters (turkey mounds) was mandated by DER Regulation (Tr. 1096-1099). The Court therefore dismissed the counts in which subsurface sand filter were necessary and instructed the jury that turkey mounds (above ground sand filters) were systems which had to be approved by the DER and could not legally be approved by local authorities.

The Defendants' Cases

The defendant Goldberg did not testify nor did he or PIC call any witnesses.

POINT I

There was no constructive amendment of the indictment.

Defendants claim that the indictment was constructively amended when a new theory of fraud was postulated at trial and when the Government proved uses of interstate facilities other than mailings. These claims are without merit.

(A) The fraud proved was the fraud alleged in the indictment.

The fraud alleged in the indictment (and as posited by defendants (Def. Br. p. 15) was that the defendants falsely represented to HRF purchasers that they could construct on-site septic tank systems which *would be approved by the Township of Penn Forest.* The Government proved that the "septic tank system" would have to be a "turkey mound" or septic tank with above ground sand filter, and that such systems could not be approved by the township but had to be approved by the Pennsylvania State Department of Environmental Resources. Thus, the fraud proved was precisely the fraud alleged.

Defendants now for the first time complain that, because the Court and counsel for both parties often used the words "conventional system" as a shorthand reference for the kinds of on-site septic systems which could be approved by the township, the indictment has been con-

structively amended by the proof and by a change of theory. This argument should be rejected not only because it was never raised below, *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966), but more importantly because the record established a consistent theory which employed the word "conventional" in the indictment and at trial merely to avoid confusion of technical terms, and in no way changed the theory of the Government's case.

The phrase "conventional system" was used and understood by all because it was the colloquial phrase for the simpler, standard, septic tank systems *for which township officials could issue permits.* The introduction to the Indictment specifically used this term to describe such systems (pp. 4 and 5), as did Michel who described various kinds of on-lot sewage systems and his professional opinion of which government agency could issue permits for them (Tr. 413-414, 439-442, 460-462). Contrary to defendants' assertion that the Government used the term "conventional" in order to set up a straw man, it is clear that defense counsel began to focus on this colloquialism on cross-examination of Michel (Tr. 489-490, 498, 518) and then elicited from Michel the above general definition (Tr. 522-523, 526, 567-570) which was thereafter adopted by all at the trial.*

Thus, from indictment through trial a "conventional" system meant a simple system not requiring State DER approval—the very kind of system promised by defendants and the very system the Government proved was not

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* Subsequently, other witnesses, for the sake of convenience and clarity, adhered to the above-described definition for "conventional" (Tr. 588, 785-787, 899-900, 904-906).

available. The use of the word signified no "shift of strategy" and constituted no "added theory." *

(B) There was no amendment of the indictment by the proof of the jurisdictional elements on the land fraud counts.

Defendants argue that there was a fatal amendment to the indictment and variance in proof. They claim that since each land sales fraud count included a general allegation of use of the interstate facilities and the mails and a specific allegation of particular mailing, the Government was limited to proving this jurisdictional element exclusively by proving the specific mailing. Therefore, according to the defendants, when the Government proved use of the telephone and interstate travel as well as the mailing specifically alleged, the Government's proof varied from the indictment.** Furthermore, defendants claim that the Judge's charge varied from the indictment because the Court instructed the jury to consider the other evidence of interstate activity and not the mailings, on the land fraud counts.

These claims are without merit. The general jurisdictional allegation in the indictment was broad enough

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* Defendants' misreading of the record is evident from the statement on p. 15 n. 1 of their brief. There defendants claim that the Government witnesses testified that on-site disposal systems could be accommodated to each and every lot. This totally ignores the testimony and the Government's consistent theory that although a system might be designed for each lot, some lots would require State approval and buyers were lulled into a false sense of security thinking that local township approval was sufficient and virtually automatic.

** The indictment alleges that the defendants did ". . . directly and indirectly make use of means and instruments of transportation and communication in interstate commerce and of the mails, to wit: (specific mailing) . . ."

to permit the proof of telephone calls and interstate travel to establish the jurisdictional element even though the Government could have relied exclusively on the specific mailings alleged in the land fraud counts which, in any event, were proved at trial and necessarily found by the jury.

Judge Brieant correctly ruled prior to trial that the land and mail fraud counts, even if relying solely on the same mailing, were not multiplicitous.*

At trial, the government proved, as noted, not only the specific mailing referred in the indictment but also use of interstate facilities to execute the fraudulent land sales, as the indictment also charged. However, out of an abundance of caution and adopting the Government's suggestion, which was not objected to by defense counsel, the Court charged the jury that it was not to consider the mailings on the land fraud counts and only to consider

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* Defendants claimed below that reliance on the identical mailings in the land fraud and mail fraud counts is multiplicitous. The District Court rejected this argument holding that different elements had to be established under each statute, *e.g.*, reliance, actual loss and a completed sale under the land fraud charges, Mem. Op. June 3, 1974, citing *Blockburger* v. *United States*, 284 U.S. 299 (1932) and *Gore* v. *United States*, 357 U.S. 386 (1958). Other indictments which alleged violations of the securities fraud statute, upon which the land fraud statute was modeled, and the mail fraud statute have been upheld. *United States* v. *Dioguardi*, 332 F. Supp. 7 (S.D.N.Y. 1971); *United States* v. *Birrell*, 266 F. Supp. 542 (S.D.N.Y. 1967); *United States* v. *Amick*, 439 F.2d 351, 359 (7th Cir.), *cert. denied sub nom. Irving*, 403 U.S. 918 (1971).

the other alleged interstate activity about which there had been testimony.*

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* As noted earlier, mailings and use of interstate facilities were alleged in the indictment. It certainly was understood by defense counsel that the Government could prove interstate acts other than mailings. Indeed the defendants demanded particulars as to the non-mail jurisdictional bases for the land fraud counts and such particulars were furnished by the Government. Moreover, during pretrial motions defense counsel wrote the following letter to the Court, making crystal clear that the Government's proof of the jurisdictional element of the offense was not limited to the specific mailing charged:

ELLIOT A. TAIKEFF
Attorney At Law
By Hand

401 Broadway
New York City 10013
LF 3-3333
LF 3-3332
May 22, 1974

Honorable Charles L. Brieant, Jr.,
United States District Judge
United States Courthouse
New York City, 10007

Re: U.S. v. Pocono International, et ano
73 Cr. 630

Dear Judge Brieant,

I am constrained to reply to the Government's hand-delivered letter of this date because paragraphs 2 & 3 of that letter misstate, albeit unintentionally, the argument advanced by the defendants on the subject of multiplicity.

In the closing paragraph of its letter, the Government tacitly admits that the Government would not be prejudiced and, in addition, does not deny that the defendants would be prejudiced as they have claimed.

The defendants *have not* suggested that the Government *must* prove the use of the mails under Title 15, and the defendants *do* understand that the Government is free to prove the Title 15 fraud counts by establishing the use of *any* interstate facility *or* the mails (defendants' reply memorandum, page 2, par. 3). What the defendants

[Footnote continued on following page]

Given the averments of use of interstate facilities, as well as mailings, in the land fraud counts, it was hardly impermissible for the Government to offer proof of the former at trial, particularly since the defense had conceded that the Government might do so. *United States* v. *Conti*, 361 F.2d 153 (2d Cir. 1966), *vacated and remanded on other grounds*, 390 U.S. 204 (1968). Similarly, the Judge's charge regarding this aspect of the land fraud counts did not constitute an impermissible amendment of the indictment within the meaning of the cases defendants rely on. The gravamen of the offense charged in the land fraud counts was the fraudulent transaction, not the mailing or use of an interstate facility Cf. *United States* v. *Birrell*, *supra*, 266 F. Supp. at 543. The latter, while it must be pleaded and proved, ". . . is logically no part of the crime itself". *United States* v. *Blassingame*, 427 F.2d 329, 330 (2d Cir. 1970). Given the averments in the land counts, amplified in the bill of particulars, of

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have asserted is that, in the context of this case, the Government could not prove a violation of 18 USC § 1341 (fraud in the sale of a lot through the use of the mails) without simultaneously proving a violation of 15 USC § 1703(a)(2)(A) (defendants' reply memorandum, page 2, par. 2). Since the proof under Title 18 also constitutes proof under Title 15 as well, the Government cannot justify proceeding under both the Title 18 counts and the Title 15 counts. The fact that the Government has numerous opportunities to prove its case under Title 15 does not negate the defendants' argument about eliminating the Title 18 counts as long as the proof required under Title 18 is precisely the same as would satisfy *one of the ways* in which the Title 15 counts could be proven.

Thanking the Court for considering this further argument, I remain,

Respectfully yours,

ELLIOT A. TAIKEFF

cc: BART M. SCHWARTZ, ESQ.
Assistant District Attorney

uses of interstate facilities apart from the mails, the Court's instruction to the jury to disregard the averment of mailing in the land fraud counts and to base its finding of the jurisdictional element on proof of the use of interstate facilities, while unnecessary was not an impermissible amendment of the indictment. *United States* v. *Cirami*, 510 F.2d 69 (2d Cir. 1975). The defendants, who did not object to any of this below—and indeed had specifically conceded its permissibility, have made no showing of prejudice whatsoever on appeal.

But even if this Court were to find that error was committed, despite the general allegation and the notice to defendants, there still is no reason to set aside the verdicts on these counts. This is so because the mailing which was alleged, proved and necessarily found by the jury under the Court's charge on each mail fraud count is the same mailing which was alleged in each land sales count. The jury's finding of these mailings may properly be used to support the verdicts on the land fraud counts even if the land fraud counts were submitted to the jury on an improper theory for the determination of the jurisdictional element. *United States* v. *Reid*, 517 F.2d 953, 965 (2d Cir. 1975); *United States* v. *Baratta*, 397 F.2d 215, 225-226 (2d Cir.), *cert. denied*, 393 U.S. 939 (1968); *United States* v. *Jacobs*, 475 F.2d 270, 283 (2d Cir.), *cert. denied sub nom. Lavelle*, 414 U.S. 821 (1973).

POINT II

The trial court correctly found that DER regulations required State rather than local township approval prior to the construction of above ground sewage disposal systems.

Defendants attack the trial court's interpretation of various of the DER regulations. They assert that the trial court erred in finding that DER regulations require State, rather than local township, approval for the use of above ground sand filter (turkey mounds) sewage disposal systems (Def. Br. Point II, B); and that, in any event, such a construction of otherwise ambiguous regulations, after the fact of Goldberg's conduct, deprived him of fair notice of the crime charged. The contentions are without merit.

A. State approval was required for above ground (turkey mound) sand filters.

The defendants had claimed at trial that both underground sand filters and above ground turkey mounds were systems which the township authorities could approve, because there was no regulation having the force of law which prohibited the township from doing so. The Government contended that both underground and above ground sand filter systems required State approval.

As to underground sand filters, the Government argued that since the unvarying State and local practice and understanding was that permits would not be issued locally and were not being issued locally without State approval, defendants' representations that local permits were available were fraudulent. The trial court found, however, that in the absence of any regulation indicative

of the contrary, the township had the legal authority to issue permits for underground sand filters—even though the township itself had not claimed any such authority and indeed had acted in practice on the assumption that it had none. The Court therefore ruled that defendants' representations regarding the availability of locally approvable on-site sewage disposal systems—to the extent those representations referred only to subsurface sand filter systems—could not, as a matter of law, be found by the jury to have been fraudulent.*

As to the above ground turkey mounds, however, the Court found that the practice of requiring State rather than local approval did have a foundation in regulations duly promulgated pursuant to the Pennsylvania Sewage Facilities Act, 35 P.S. § 750.1 *et seq.* and that therefore the township was without authority.** It is this finding that defendants contest.

The Court based its finding on turkey mounds primarily on the clear words of two portions of Chapter 73 of the Regulations. Section 73.11(e) sets out the general, overall requirement that:

> "The maximum elevation of the groundwater table shall be at least four feet below the bottom of the excavation for the leaching area."

Section 73.61(a) gives a general requirement for absorption areas that:

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* See, *infra*, p. 28, ftn., for the Government's view that, notwithstanding the trial court's finding that the township had the legal authority to grant approval for underground systems, the defendants' representations of the availability of local approval for such systems were nonetheless false.

** *Rules and Regulations*, Title 25, Ch. 73: Standards for Sewage Disposal Facilities. (Reprinted in full, Def. Br. pp 81-94).

> "When the percolation rate is over 60 minutes per inch, a subsurface disposal system as described in this chapter shall not be used. Proposed alternate methods shall not be used unless approved by the Department."

The Court reasoned that the "alternate" methods referred to in the second sentence of Section 73.61(a) obviously meant alternate to "subsurface" and thus meant above ground systems such as turkey mounds. It also read the second sentence to apply to above ground systems being used for any reason (such as to acquire the necessary four foot elevation above a high water table) and not just when the soil problem was a slow percolation rate. Defendants argue that the requirement of State approval for above ground systems must be limited to those instances of soils with a percolation rate problem and do not include soils with a high water table problem.

Defendants' position makes little sense in light of the clear policy objectives the pertinent regulations seek to achieve. Both regulations seek in substantial measure to maintain a given inhabited area, and its underground waters, free from any contamination by sewage disposal. It would be anomalous, indeed, if the regulations were read to require State approval for turkey mounds made necessary by percolation rate problems, but permitted turkey mounds to be built in response to high water table problems without the necessity of State approval.

Moreover, the Court's interpretation not only coincides with the literal words of the regulation, but is the only meaning consonant with the other regulatory provisions. The clear scheme of the regulations is to delegate to local authorities the task of issuing permits for the run-of-the-mill septic system, where standards have been set out for their guidance. The complex or the experimental sewage system required review and approval by the technical ex-

perts of the DER, at the State level. Thus the Regulations provide that:

> "Construction . . . of sewage and sewerage systems shall be in accordance with the standards adopted by the Department and included in this Chapter." § 73.2(b).

Section 73.3 authorizes the Department to adopt standards, and further states that:

> "No person shall install, and no approving body shall issue a permit for or approve, a sewage or sewerage system which violates such standards." § 73.3(b).

The regulations then set out the standards promulgated by DER for various subsurface systems, including subsurface sand filter beds. However, no standards are set out for any above ground system. Obviously, the local authority could not have issued permits for the turkey mounds for which they had no standards.

In addition to fitting into the overall regulatory scheme, the Court's interpretation was the same as that consistently applied by the DER in its manual, instructions and policies (Tr. 569-570, 787, 899-900, 906, 991-998). The reasonable interpretation of a statute or regulation by the agency charged with its administration is entitled to great weight, *Volkswagen* v. *FMC*, 390 U.S. 261 (1968), particularly where, as here, the interpretation is supported by the regulatory language and purposes. Thus it is clear that the Court properly found that the township was without authority to issue permits for turkey mound systems.

B. Goldberg had fair notice that State approval was required for exotic sewage disposal systems, including turkey mounds.

The thrust of defendants' second challenge to the trial court's ruling is that the regulation which was the source for the requirement that turkey mounds required special State approval was so vague that defendants could not have had fair warning of the way it was going to be interpreted; and that since criminal liability hinged ultimately on the interpretation of that regulation, the principal which requires clarity in criminal statutes, applicable here, requires reversal.

It is clear from the foregoing discussion, however, that the regulations, taken together, on their face require State approval for turkey mounds. Indeed, the State never published any standards in accordance with which local authorities could have determined requests for permits to construct turkey mounds. Equally important, and wholly ignored by defendants, is the fact that these regulations, in practice, had been consistently construed by both the appropriate local and State agencies as requiring State approval for turkey mounds; and that that official practice had been memorialized in the State manual and was known to engineers and others. A corporation and its principal, developing land in Pennsylvania, as here, could hardly be said to have lacked sufficient and clarifying regulatory gloss, in the form of unvarying practice and a written manual, for the assertedly ambiguous regulations.

In any event, assuming *arguendo* that the regulations were vague, the defendants nonetheless had extensive, precise warning about what their duties under the law were as to exotic sewage systems in general. Goldberg had direct notice from his own engineer, Michel:

> "I told [Goldberg] about aerated tanks, sand filters, and bringing fill in, and that the conditions would

> require a design which would have to be approved by the Department of Health. . . ." * (Tr. 421, see also Tr. 416-417).

Under these circumstances where Goldberg had direct notice, there could hardly have been any surprise.**

The constitutional limitation on criminal statutes which defendants recite has been applied by them out of context. Here, the DER regulation did not define a criminal act. It merely informed people how they were to go about constructing sewage systems. Defendants were not convicted under it, but under criminal statutes which prohibited them from fraudulently misrepresenting facts or omitting to tell purchasers of material facts. If defendants *had* advised buyers of the necessity to use turkey mounds on some lots (which they did not), the conclusion is inescapable that they would have been required to inform such buyers about what agency would issue permits for such systems. If that information was questionable, or the regulation vague, still the duty was surely on defendants to take note of and if necessary clarify for the

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* Known to Goldberg as the State agency which preceded DER.

** The Government does not contend that Michel told Goldberg specifically about "turkey mounds" as such in 1971 or 1972, other than Michel's general warning to him about sand filters (Tr. 516-17; GX 32A). Goldberg knew from Michel alone, however, that other than run-of-the-mill systems would be required on 20 per cent of the plots and would require State approval. The use of aerated systems, for example—suggested by Michel as one alternative—clearly required State approval. See Sections 73.41-73.47 of Chapter 73 of the Regulations. In the face of all this, Goldberg—hoping to state enough to gain HUD approval, but still clearly mislead purchasers—made vague references in Section 10(b) of the Property Report to the fact that "additional corrective work . . . *may* be necessary" (emphasis added). The Property Report further promised buyers, however, that septic tanks, locally approvable, could be used, in any event.

buyers the conflict in the regulation, instead of perpetrating a fraud by advising buyers of the availability of local approval—thereby either ignoring the regulations or interpreting them in a manner which was contrary to all advice and known practice.*

The Court correctly interpreted the local regulations and the defendants had ample notice that their activities operated as a fraud on the buyers.

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* Since the evidence showed that aeration tanks and subsurface sand filters could not compensate for a high water table within four feet of the surface, which is what existed on the seven lots, the Government would have proven its case had it rested there and the subject of turkey mounds never been broached. The issue of which governmental unit could issue permits for the suggested non-standard systems was moot at that point because those systems would not have been adequate anyway. It was at that juncture of the testimony that defense counsel began, on cross-examination, to suggest that there was another system, the turkey mound, which could compensate for a high water table. So, because the defense now contended that turkey mounds could be used, the question of who could approve them became important. The present suggestion that at trial the Government shifted from theory to theory, and that defendants were misled into a course of action in 1971 or 1972 by the vagueness of the DER regulation, is therefore utter nonsense. Contrary to defendants' assertion (Def. Br. p. 26), the pertinent issue at trial was always whether there was any fraud in defendants' representation that sewage could be disposed of by septic tank systems, including the non-conventional forms thereof, the construction of which could be approved by local authorities. See ¶ 5 of the Indictment, which by incorporation was realleged in each of the fraud counts; and ¶ 12 of the Indictment.

POINT III

The evidence was more than sufficient to support Goldberg's conviction on the fraud counts.

Defendants assert that the evidence failed to establish any false representations upon which Goldberg could be convicted.* The assertion is frivolous and is premised in part on a misreading of the record. Defendants contend that Goldberg could be convicted on the "fraud counts" only on the basis of what was contained in the Property Reports. This is simply not so, nor did the Government ever "concede" that it was.** In addition to the Property Report, the representations in the Statements of Record—the original of which was signed by Goldberg (Tr. 1215, GX 4)—were received in evidence at least as to the mail fraud counts, since they too were a part of the scheme to defraud (Tr. 55, 465-468). In any event the evidence amply demonstrated that Section 10(b) of the Property Report included misleading and false representations, thereby creating a jury question on

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* Defendants mysteriously press this argument only on behalf of Goldberg and not PIC. It should be noted that defendants apparently do *not* attack the sufficiency of the proof connecting Goldberg to the scheme or his knowledge of it.

** The Statements of Record, while constituting part of the scheme to defraud alleged in the mail fraud counts, were not to be considered by the jury on the land sale fraud counts. This was agreed to since a material element of the latter crimes was proof of "reliance" by the purchasers, and the Government neither alleged nor proved that any purchaser had ever seen any of the Statements of Record.

We note in passing that while defendants' various misreadings of the record may be excused as inadvertence, defendants' *ad hominem* attacks on the propriety of the Government's conduct of the trial cannot. We need note only that defendants' rhetoric is utterly baseless and false and, understandably, is mouthed without support of any record references.

the fraud charges. That fraud was further evidenced by proof of the representations contained in the Statements of Record.*

Section 10(b) of the Property Report states that sewage will be disposed of by "septic tanks", estimated to cost $600.00. It goes on to say this method is acceptable under State and local health regulations. It then warns that "in some instances" a sand filter bed may be necessary, bringing the cost up to $1,200.00. Finally, it says that the township will approve "septic tanks and other on-lot" systems.**

Contrasted with these representations was the Government's proof that a septic system consisting of septic tank with a disposal area consisting of a tile field, seepage bed or serial distribution *could not be used on any of the seven lots* in the indictment and many others (Tr. 697-712). A "corrective" sand filter below ground, as suggested by the Property Report, *could not be used either*, because of the high water table (within four feet of the ground's surface) on the lots and, in practice, would have required *State approval* rather than that of the township (Tr. 713-714, 785-787, 899-900). A turkey mound, which the report did not even suggest, could not—as a matter of law as well as practice—be approved locally (Tr. 900, 991-2, 1096-9). Furthermore, Michel specifically warned Goldberg that at least 20% of the

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* Since defendants apparently limit their argument to whether the evidence is sufficient as against Goldberg, we omit discussion of the oral misrepresentations attributable only to PIC.

** These representations are set out in full in GX 4 and 5 and in the Government's Appendix at pages A1-2.

lots would require systems that the local authorities could not approve.*

Leaving aside for the moment the issue of whether the Court properly limited the scope of Government's case on the fraud counts by its interpretation of the DER regulations pertaining to non-conventional systems, there can be no doubt that even as so limited the representations of the Property Report and the true facts were sufficiently inconsistent to warrant submission of the fraud counts to the jury.** The Statement of Record states

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* It is clear from the testimony of Dr. Loughry alone that State approval—as required by the Regulations—for such exotic systems as aerated or aerobic tanks and turkey mound sand filters had not been and would not be readily forthcoming for lots with the high water table problems characteristic of the lots which were the subject of the indictment (Tr. 705-714). Absent such approval, construction of a residence would be virtually impossible. In the case of certain of the individuals who had purchased lots of HRF, in reliance on the Property Report's misrepresentations, the State granted certain "hardship" permits, not otherwise available (Tr. 968-973).

** Assuming *arguendo* that the trial court correctly found that under DER regulations the Township had legal authority to grant approval for underground sand filter systems, we respectfully submit that it erred nonetheless in dismissing those fraud counts the pertinent lots of which were suitable for a subsurface sand filter or other exotic disposal system. Defendants' representations even as to those lots were false and misleading since the uncontested evidence established that State and local practice precluded local officials from approving underground sand filters. Surely a purchaser is materially misled when he is told he can obtain a local permit but the fact of the matter is that he can obtain the permit only by compelling local authorities to exercise a power they had never exercised before, one for whose exercise they were largely untutored and one which local authorities did not think was theirs. Under such circumstances, the only truthful and complete representation was one which notified purchasers that at the very least they would face local bureaucratic opposition before they could establish a legal right to a local permit.

clearly that septic tanks are to be used, the average cost is $600, and "this method of sewage disposal has been approved by the township. The supporting documentation by Michel, the engineer, filed with HUD adds that aerated tanks and sub-surface sand filter beds may be necessary. Again, no warning is given that State approval is needed for aerobic tanks and, in practice if not by law, for sub-surface sand filters, nor that high water tables within four feet of the surface on some lots *will* require the use of still other systems—turkey mounds—for which State approval must be obtained. Indeed the failure even to suggest to buyers the possible necessity to use turkey mounds was itself a failure to inform the buyers of a material fact, regardless of the additional misrepresentation about local approval. See *Lustiger* v. *United States*, 386 F.2d 132 (9th Cir. 1967); *Irwin* v. *United States*, 388 F.2d 770 (9th Cir. 1964), *cert. denied*, 381 U.S. 911 (1965).

Defendants' assertion (Def. Br. p. 23) that the evidence revealed that the township could issue permits for all lots and there was no instance where a permit was refused is simply false. In fact, the record includes instances where permits were refused (Tr. 991). Moreover, there is not a shred of evidence in the case to suggest that the township ever issued a permit for, or thought that it could issue a permit for, aerobic tanks, sand filters, either above or below ground, or any other such exotic system.

In sum, the defendants' representations concerning the type of sewage facility suitable for HRF and in particular for the seven lots sold, and concerning which governmental agency could approve their use, were clearly contrary to the true facts as evidenced by the Government's proof at trial. The trial court correctly submitted the fraud counts to the jury, whose verdicts of guilty thereon were amply supported by the evidence.

POINT IV

The Court's charge was clear and in all respects proper.

Defendants raise a series of alleged errors in the Court's charge to the jury which they claim resulted in confusion and a muddling of the issues in this case. These claims are all frivolous.

Judge Brieant's charge, viewed as a whole, was neither confusing nor ambiguous, but rather a fair and accurate set of legal instructions. Indeed, the charge was so clear that none of the issues now raised were raised below. For this reason alone, these claims of error, none of which affect a substantial right of the defendants, should be dismissed. Rule 30, Fed. R. Crim. P.; *United States* v. *Pinto*, 503 F.2d 718, 723-24 (2d Cir. 1974); *United States* v. *Indiviglio*, *supra*, 352 F.2d at 279-80; *United States* v. *Birnbaum*, 373 F.2d 250, 257-58 (2d Cir.), *cert. denied*, 389 U.S. 837 (1967).*

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* Of course, Rule 30 may not be invoked as a bar to appellate review in instances where the District Court has committed plain error "affecting substantial rights" of an accused. Rule 52(b), Fed. R. Crim. P. See, *United States* v. *Pinto*, *supra*; *United States* v. *Indiviglio*, *supra*. However, in assessing whether the District Court committed "plain error" in its charge, it must appear to the satisfaction of this Court that the trial judge's charge, viewed as a whole, is so deficient and defective in material respects as to have deprived the defendants of a fair trial, or otherwise to have seriously affected the "fairness, integrity or public reputation" of the involved proceedings. *United States* v. *Indiviglio*, *supra*, 352 F.2d at 280. Clearly, viewing the totality of Judge Brieant's charge in the context of the instant trial, the District Court's instructions were a fair, adequate and accurate statement of the applicable law, without any error, and certainly not plain error.

The claims of error are disposed of *in seriatim.*

(a) Defendants contend that the District Court's use of the phrase "which establishes the crime charged" (Tr. 1262) just prior to reading Title 18, United States Code, Section 1341 to the jury may well have left the impression that the Court had an opinion with regard to the guilt of the defendants on the mail fraud counts. This is sheer nonsense and a frivolous play on semantics. In full context, Judge Brieant said: "I will now read to you the so-called mail fraud statute. That is the statute which establishes the crime charge[d] in Counts 1, 2, 4, 7, 8, 9, 11 and 12 of the indictment" (Tr. 1262). The Court then proceeded to read Section 1341 to the jury. It is plain that the Judge was saying no more than that he was going to read the statute which creates, defines, specifies or, to use his phrase, establishes the federal crime of mail fraud. A contrary reading of the court's instruction in this regard is simply not warranted.

(b) Defendants claim that the Judge committed error in his instructions regarding the concepts of knowingly, wilfully and unlawfully and another error when "he then singled out Goldberg alone on the key issue of knowledge, excluding the corporate defendant, by repeated references to 'the' defendant and use of the words 'he', 'his' and 'him' ". Judge Brieant's charge on the elements of knowledge, wilfulness and unlawfulness (Tr. 1271-72) was wholly accurate, adequate, fair and has been approved by this Court, *United States* v. *Berger*, 433 F.2d 680, 684 (2d Cir. 1970), *cert. denied*, 401 U.S. 962 (1971); *See, United States* v. *Mekjian*, 505 F.2d 1320, 1324 (5th Cir. 1975); *American Surety Co. of New York* v. *Sullivan*, 7 F.2d 605, 606 (2d Cir. 1925); *cf. Screws* v. *United States*, 325 U.S. 91 101-07 (1945); *United States* v. *Schabert*, 362 F.2d 369, 374 (2d Cir.), *cert. denied*, 384 U.S. 919 (1966). Moreover, defendants' argument that the District Judge "singled out Gold-

berg" on the question of knowledge is simply not supported in the record. During his discussion of this element, Judge Brieant clearly and precisely stated "of course when I say 'he', I include the corporation in this instruction" (Tr. 1281). The jury could not have been misled.*

(c) Defendants argue that Judge Brieant's instruction that "in this concept of unsuitability I am including within the concept the availability of the permits from the local authorities of the town of Penn Forest" (Tr. 1278) failed to present for the jury's consideration "the separate and distinct issue" concerning the availability of permits. Of course, no exception was taken by defendants to this portion of the charge, and the District Judge was not afforded the opportunity to amplify or clarify the instruction which defendants now claim to be inadequate. Moreover, in the context of the trial, the trial court's instruction and the counts that went to the jury, the questions of suitability of the land for "conventional" systems and the availability of permits from the town were the same.

(d) In an exultation of the trivial over the substantial, the defendants next contend that in reviewing the indictment with the jury "the judge twice referred to certain counts as identical in form to those previously read [Tr. at 1308], without distinguishing between the mail fraud and land fraud counts, both of which had in fact

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* Interestingly enough, in summation defense counsel stated, "by the way, unless it becomes a technical necessity, I may refer to Mr. Goldberg or the corporation interchangeably . . ." "I don't mean to influence your judgment . . . but I think I will save time and save words if I refer to one of them or perhaps both of them jointly instead of being specifically and technically accurate . . ." (Tr. at 1154).

been previously read" (Def. Br. 42). In context, the Judge's reference to the form of previous counts could not have been misleading. These references were made during the Court's discussion of the land fraud counts of the indictment (Tr. 1301-11), at a time well after the completion of the Court's review of the mail fraud counts (Tr. 1296-1301). Moreover, the District Judge permitted the jury to have a copy of the indictment in its possession during the deliberations with an appropriate cautionary instruction (Tr. 1250), and any confusion resulting from the form of the charge, assuming *arguendo* the possibility of such confusion in the minds of presumptively rational and intelligent jurors, was necessarily dissipated by their ability to refer to the precise allegations of each count at the time when that particular count was the subject of their discussions. For the Court to have proceeded differently and have laboriously read each and every count of the lengthy indictment would have been a mistake. *United States* v. *Kelly*, 349 F.2d 720, 765 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966).

(e) Defendants also assert that in reviewing the evidence with regard to certain of the land fraud counts (Tr. 1308-11), the Court "built up the fraud as a whole to an unwarranted degree" (Def. Br. 42). Again, no objection to the Court's statement in this regard was taken before the jury retired and, when viewed in the context of the entire trial, the nature of the Judge's comments reveals no impropriety. There is no claim that the Court improperly commented on or inaccurately marshalled the evidence or expressed any opinion. It has long been recognized that federal trial judges may "assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important." *Quercia* v. *United States*, 289 U.S. 466, 469-70 (1933); *United States* v. *Tourine*, 428 F.2d 865, 869-70 (2d Cir. 1970), *cert. de-*

nied, 400 U.S. 1020 (1971); *United States* v. *Kahaner*, 317 F.2d 459, 476-80 (2d Cir.), *cert. denied*, 374 U.S. 836 (1963). In the instant case, Judge Brieant clearly cautioned the jury that it was the sole and exclusive judge of the facts and that it was not bound by any comments he made (Tr. 1247-49, 1310-11). Moreover, it is manifest that the comments made were fair and within the bounds of propriety. Judge Brieant "was not required to comment on every tidbit of evidence . . . that each litigant considered most favorable to him." *United States* v. *Bentvena*, 319 F.2d 916 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963). See also *United States* v. *Tramunti*, 513 F.2d 1087, 1119-1120 (2d Cir. 1975).

(f) Defendants further contend that the District Court "lapsed into plain error in reading a part of the land fraud statute not charged in the indictment" (Def. Br. 43) and, thereafter, compounded this alleged error "when the judge erroneously charged that the Government relied on false representations in the statement of record" (Def. Br. 44). The Judge's recitation of 15 U.S.C. § 1703 (a)(2)(B) to the jury (Tr. 1263) contained the entire subsection (B), including the first phrase which relates to misrepresentations "with respect to any information included in the statement of record or the property report."

Defendants seem to advance two inconsistent contentions, the first being that the entire phrase should have been omitted and the second being that the reference to "Statement of Record" only should have been omitted. The first contention has no merit and the second, while correct, does not establish that there was error below.

As to the first contention, defendants erroneously assert that there never was any allegation of "misrepresentation *with respect to* information included in" the Property Report, but only an allegation of "misrepresentation *in* the Property Report" (Def. Br. 44). It is impossible

to understand what defendants gain by attempting such a distinction, but in any event no such distinction or limitation was ever made or requested during trial. The Government consistently charged a violation of the entire subsection (B) of 15 U.S.C. § 1703(a)(2), with the single exception that it did not claim that purchasers ever saw or relied on the Statement of Record.

While the Court's inclusion of the words "Statement of Record" in reading the statute was unnecessary, it was hardly error to do so.* The overall tenor of Judge Brieant's charge plainly indicated to the jury that the defendants were not charged with misrepresentations "with respect to any information included in the statement of record." Moreover, the District Court clearly, precisely and explicitly defined the elements of the land fraud counts (Tr. 1288-92) in great detail and *without any reference to the extraneous statutory phrase.* Assuming arguendo that a reading of inapplicable words in a statute could *ever* cause prejudice, their inclusion as part of the Court's instructions did not, in these circumstances, prejudice these defendants, and if error, it is clearly harmless beyond a reasonable doubt. *Compare United States* v. *Borkenhagen*, 468 F.2d 43, 49-50 (7th Cir. 1972), *cert. denied*, 410 U.S. 934 (1973); and *West* v. *United States*, 359 F.2d 40 (8th Cir.), *cert. denied*, 384 U.S. 867 (1966); see also, *United States* v. *Baratta, supra* 397 F.2d at 225.

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* Defendants rely on *Wood* v. *United States*, 342 F.2d 708, 711-712 (8th Cir. 1965), *cert. denied*, 384 U.S. 978 (1966), and *United States* v. *Bagby*, 451 F.2d 920, 928 (9th Cir. 1971), for their contention that Judge Brieant's mere reading of the uncharged portions of the statute was reversible error. Neither decision supports such a result, *Bagby* being entirely irrelevant. To the extent that *Wood* is concerned with the point, its authority is substantially weakened by the dissent of then Circuit Judge Blackmun, relying on a decision to the contrary in this Court, *United States* v. *Heine*, 149 F.2d 485, 488 (2d Cir.), *cert. denied*, 325 U.S. 885 (1945).

In addition, the District Court's single misstatement ascribing a false representation to the Statement of Record (Tr. 1309) rather than, as he should have, to the property report, simply does not give rise to an issue on this appeal. Defendants' trial counsel objected to the Court's statements in this regard (Tr. 1328) and this resulted in Judge Brieant giving a supplemental and curative instruction, which was acceptable to both the Government and defense counsel (Tr. 1330-1331). See *United States* v. *DeAngelis*, 490 F.2d 1004, 1009-10 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974); *United States* v. *Baratta*, *supra*, 397 F.2d at 226.

(g) The defendants next choose to quibble with the trial judge's selection of certain words concerning Goldberg's knowledge of the unsuitability of the lots in the involved tract of land. At various points in the charge, the judge used the words "some", "a substantial number" and "a major number" to describe the number of lots in the tract which the jury might find to have been unsuitable. At trial, defense counsel argued that only "some" lots were, in fact, unsuitable, while the Government argued that a greater percentage of the lots were not fit for conventional sewage facilities. The judge reflected both positions in his charge.

The distinction now sought to be drawn by defendants widely misses its mark. Questions of knowledge and intent are matters solely within the province of the jury. It is for the jury alone to determine whether or not a particular defendant is possessed of knowledge sufficient to predicate a finding of fraudulent intent. Judge Brieant fully and fairly charged the jury on the elements of knowledge and wilfulness, intent (Tr. 1274-79) and reasonable doubt (1251-52) and, viewing the entirety of the charge in light of these instructions, the jury was properly left to determine whether or not a particular defendant acted

with the requisite mental state to be found criminally liable. *Cf. United States* v. *Tortorello*, 480 F.2d 764, 785 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973). Moreover, use of such terms as "major" or "substantial" could not have prejudiced the defendants because, if anything, they compelled the Government to satisfy a higher burden of proof in order to obtain a conviction. *United States* v. *Deutsch*, 451 F.2d 98, 113 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972).

(h) At one point during his charge, Judge Brieant indicated to the jury that "we are dealing basically with three separate types of charges" (Tr. 1261), while later in his instructions the Judge stated that "there were three different violations of the Interstate Land Sales Act" charged in the indictment (Tr. 1286), in addition to the mail fraud counts. Defendants contend that these statements are contradictory and resulted in the jury being in a "confused state" (Def. Br. 47). This claim is specious. The statements are both accurate and consistent. Moreover, the District Court charged the jury with regard to each of the crimes submitted to it element by element and in great detail. The "confusion" defendants assert is both speculative and frivolous.

(i) In their final challenge to the trial Court's instructions, the defendants continue to speculate concerning the mental state of the jurors and to attribute to them a state of confusion which is without support in the record. Indeed, each of the notes submitted to the Court by the jury during its deliberations, some of which requested exhibits by specific number, indicate that the jurors were engaged in a conscientious, orderly and deliberate search for the truth. With regard to the final note submitted by the jury (Court's Exhibit 10), defendants assert that the Judge's reply "added to the very core of the confusion" (Def. Br. 48). However, the Court's response to Court's Exhibit 10 was given after discussion

and consultation with counsel and was not objected to on *any* ground by defense counsel. The response was accurate and defendants, aside from making the unwarranted assumption of confusion, have not demonstrated that any of their substantial rights were adversely affected thereby. The Court's action was not plain error and indeed, as with defendant's other contentions, it was not error at all.

In sum, whatever confusion there may be was not at the trial and not on the Judge's part, and all defendants' contentions relating to the charge are without merit.

POINT V

Goldberg's conviction of the sale of unregistered land and the sentence imposed thereon were entirely proper.

(A) Sufficiency

Defendants claim that the evidence of Goldberg's guilt on the sale of unregistered land is "nearly" insufficient. This claim is accurate only to the extent that it apparently concedes the evidence was sufficient. Otherwise it is frivolous.

Ignoring whole lines of proof and testimony, defendants claim that the "sole" evidence of Goldberg's knowledge that sales took place prior to the effective date of the statement of record was Failla's testimony (Def. Br. p. 49).*

* No claim is or could be made that Goldberg was unfamiliar with the necessity to obtain an effective filing before sales could commence since that is the precise reason he retained Failla. Moreover, Goldberg himself had participated in the two prior filings with HUD in regard to Sections 7-8 and 5-6, and had personally signed the first Statement of Record so filed.

The evidence supporting the convictions on the non-registration counts, independent of Failla's testimony, was itself overwhelming. It was stipulated that more than 100 lots, or over 50% of the inventory, in sections 1-4 were sold even *before* the Statement of Record was filed with HUD (Tr. 1081). The six lots charged in the indictment were sold prior to or on the same day as the filing. There were letters regarding those sales sent over Goldberg's name to the six purchasers named in the non-registration counts of the indictment (GX 45D, 46B, 52E, 56E). Goldberg, on June 5, 1972, more than two months prior to the effective date of the registration, wrote to Sellamerica about the sale of a lot in sections 1-4 (GX 76; Tr. 1081). Furthermore, PIC was essentially a one-man operation, with Goldberg the organizer, 90% stockholder and chief operating officer (Tr. 1043-1048, 1052), and the HRF acreage illegally sold was a substantial portion of the entire acreage to be sold by PIC. To suggest that Goldberg—the chief operating officer of a one-man corporation whose name appeared on correspondence and who had direct dealings with his selling agents and purchasers—did not know of these unregistered sales is ludicrous.

There was additional direct proof of Goldberg's knowing participation even without resort to Failla's testimony. Michel testified (Tr. 407-408) that with Goldberg's knowledge he was active in preparing the basic plot map for sections 1-4 during the period of March 28 to May 8, 1972, and that Goldberg knew the map was a prerequisite for a HUD filing (Tr. 113-114). Also, the title to the acreage comprising sections 1-4 was transferred from the original owners to PIC on May 12, 1972 (GX 8), thereby establishing that PIC's effort to sell the land, which began as early as April, 1972, occurred even before PIC owned the land and before it obtained the various maps it needed to make a HUD filing.

Further, statements which were required to be included as part of the original HUD filing for sections 1-4 were signed by PIC's president and dated July 10, 1972, well after sales had commenced. These facts, without resort to Failla's testimony, support Goldberg's conviction and his role in the crimes charged. In addition to all this, there was the direct evidence provided by Failla's testimony—as to which defendants urge on this Court, at length, the very same asserted inconsistencies and contradictions they argued unsuccessfully to the jury below.

Failla's testimony, however, on certain key facts was not even seriously challenged on cross-examination: (i) Failla obtained a check for the initial HUD filing fee from Goldberg and Goldberg knew the reason the check was needed (Tr. 360-361)—thus establishing that Goldberg knew when the filing was to take place; and (ii) Failla had to obtain from Goldberg the completed maps as well as other data which Goldberg knew were necessary for the HUD filing (Tr. 113-117).

Defendants point to inconsistencies in Failla's testimony. Any inconsistencies which arguably exist relate to post-August 17, 1972 conversations. If anything, the existence of these conversations supports the Government's contention that Goldberg was running the corporation and Failla had to report to him. These post-August 17 conversations, during which both Failla and Goldberg believed the registration was *not* effective, were also relevant to show Goldberg's intent to sell parcels of land regardless of the status of the registration. Finally, the inconsistencies which defendants cling to are actually minor differences in Failla's sworn testimony (at trial and in the Grand Jury) as compared to what he told defense counsel who was interviewing him and recording

him, without Failla's permission, after Failla had been interviewed by the Assistant United States Attorney in charge of the case.*

(B) Joinder

Defendants next argue that the joinder of the registration and fraud counts was improper, caused manifest prejudice to the defendants and requires reversal.

It is settled beyond doubt, however, that several offenses may be charged in one indictment where they are based on the same act or transaction, or on several acts or transactions connected together or constituting parts of a common scheme.** Thus, joinder of the fraud and non-registration counts was eminently proper here, where both were concerned with the identical acts—the sales of

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* The barely veiled suggestion at pages 53 and 54 of Defendants' Brief that the Government tailored Failla's testimony is a crude tactic unsupported by anything in the record. The two "contradictions" allegedly supporting this accusation are frivolous. First, Failla's statements (a) that he told Goldberg Sections 1-4 were not valid for sale until a letter of effectiveness was received and (b) that he never told Goldberg to stop selling because of ineffective registration are not inconsistent. Failla steadfastly maintained that he was simply in no position to tell Goldberg to stop selling. Second, the other alleged "contradiction" appears to rest on defendants' misreading of the transcript. Defendants paraphrase Failla's grand jury testimony as stating that "Goldberg knew the registration was ineffective because he received all correspondence", and then say Failla subsequently "admitted" that he was merely assuming that Goldberg saw the letters. The inconsistency is not only trivial but is fabricated. The paraphrase is inaccurate because a full reading of pages 279-281 of the transcript shows clearly that Failla said in the Grand Jury only that he was assuming Goldberg knew the registration was ineffective.

** Rule 8(a), Fed. R. Crim. Proc.

lots at HRF—and could properly be said to be, as a matter of proven fact, part and parcel of a single overall scheme to defraud. Indeed, the land fraud and registration counts involved violations of closely-related subsections of one single statute. Both documentary and testimonial evidence, with respect to most of the fraud and non-registration counts, of necessity overlapped. For instance, the same purchasers where the victims of both crimes (with two exceptions); the Statements of Record and the Property Reports were essential documents in the proof of both crimes; and many of the facts bearing on Goldberg's knowledge of the fraud—such as his role in the company and the timing of his dealings with Michel —also bore on his knowledge as to when the registration statement became effective. Clearly, the joinder was proper and "in the interest of economy of trial time and effective utility of available resources." *United States* v. *Adams*, 434 F.2d 756 (2d Cir. 1970).

Moreover, defendants waived any claim regarding any assertedly improper joinder of charges by their failure to move prior to or during trial to sever, or to require the Government to elect between, any such charges. Nor did defendants preserve these claims by raising them in any post-trial motion. See *United States* v. *Perl*, 210 F.2d 457 (2d Cir. 1974).

Even if a timely motion had been made, there is no reason to believe that a refusal to sever would have constituted a clear abuse of discretion, since there was simply no showing of prejudice to defendants. *United States* v. *Adams*, *supra*. The alleged instances of prejudicial confusion recited by defendants are neither accurately stated nor persuasive and amount to little more than appellate counsel's semantic contentions. Defendants' statement (Def. Br. p. 58) that the Judge perceived the possibility of such confusion and urged the Government to

avoid it at the outset is unsupported by the record. What discussion there was about election between counts concerned only an election between the two kinds of fraud counts (Tr. 1109-1112).

It is nothing more than rank speculation to conclude, as defendants do, that the jury may have spent more time on the fourteen fraud counts than on the six registration counts, thereby assertedly somehow providing evidence of their confusion or inability to reach a separate and fair verdict on each.*

Equally without any support in the record and false is Goldberg's allegation (Def. Br. pp. 59-62), made here for the first time, that the joinder was an unconscionable contrivance by the Government to deny Goldberg his right to take the stand in his own defense, and one which artfully prevented the defense from putting on any case as to the registration counts. Further, Goldberg's asserted fear that by taking the stand he would have evidenced before the jury his supposed ignorance and unfamiliarity with the pertinent Pennsylvania regulations is unavailing even as a factual matter since any such asserted lack of knowledge, if believed, would have served to rebut the Government's proof of Goldberg's wilfulness. In any event, Goldberg never articulated for the trial court any such supposedly felt dilemma. Any relief based on Goldberg's bald assertion in this Court would, in truth, be founded on nothing more than pure supposition. See

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* On this point, defendants' assertion that an exhibit not in evidence and an improperly marked copy of the Statement of Record, which was in evidence, went into the jury, is wholly without merit, since defense counsel agreed to the selection of all documents sent in to the jury (Tr. 1335-1336). *United States* v. *Camporeale*, 515 F.2d 184 (2d Cir. 1975).

United States v. *Shuford*, 454 F.2d 772, 778 (4th Cir. 1971).* The Government proved a carefully executed scheme to defraud which included an almost total disregard of the federal registration requirements. There was no error in charging both violations in one indictment.

(C) Sentence

Finally, defendants claim that the case should be remanded for reconsideration of Goldberg's sentence. This claim is frivolous. Defendant Goldberg's sentence is well below the statutory maximum for any one count, much less for all of those of which he was convicted, and no convincing reason has been set forth to disturb the usual rule that a sentence within statutory limits is not reviewable. See *United States* v. *Velazguez*, 482 F.2d 139, 142 (2d Cir. 1973); *Dorszynski* v. *United States*, 418 U.S. 424, 440-441 (1974). Defendants seem merely to disagree with the trial court's determination that this defendant, previously twice convicted in federal court for fraudulent conduct, should go to jail.

Defendants misread the record and twist it to argue that the trial court was somehow unduly influenced by the proof of fraud, when the Court specifically stated otherwise. In any event, of course, given the jury's verdicts of guilty on the fraud counts, it beggars understanding how the trial court could have erred in weighing these verdicts in its determination as to sentence. Additionally, the claim that the Court considered the Government's withdrawal of its earlier statement about

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* It is more likely that defense counsel decided not to call Goldberg as a witness because of his two prior felony convictions for perpetrating frauds on the Veteran's Administration, in violation of Title 18, United States Code, Section 1001.

Goldberg's post-trial cooperation, even though the Court specifically rejected this retraction by the Government, is specious. The trial court's comments on Goldberg as a "late cooperator" refer to the timing of his decision to cooperate, not to the extent of his cooperation.

There was simply no judicial indiscretion in the sentencing process, such as reliance on constitutionally impermissible factors or material inaccuracies, or any other extraordinary circumstances, which would warrant a remand for resentence. *United States* v. *Brown*, 479 F.2d 1170 (2d Cir. 1973); *United States* v. *Tucker*, 404 U.S. 443 (1972).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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APPENDIX

Excerpt from the Statement of Record, Part VIII, for Sections 1-4, HRF

"E. Sewage Disposal

1. Sewers are not available in the subdivision.

* * * * *

6. Septic tanks are to be used for all lots in the subdivision.

7. The estimated average cost of installing a septic tanks in the subdivision is approximately $600.00.

8. This method of sewage disposal has been approved by the Penn Forest Township Supervisors under ordinance of the township and pursuant to rules and regulations and standards of Pennsylvania Department of Health.

9. The State Health Department requires percolation tests to determine suitability for the use of septic tanks. The developer's engineers have made such tests and the report of these tests is attached hereto in the Exhibit shown."

Excerpt from the Property Report, Section 10, for HRF

"b. SEWAGE DISPOSAL

Sewage disposal is provided by septic tanks to be constructed by the buyer at the estimated average cost of $600.00, under present price levels. Developer has been advised by its consulting engineer that such method of sewage disposal is acceptable for the subdivision under

current state and local health regulations. Developer has also been advised that in some instances additional corrective work in the form of construction of a sand filter bed may be necessary to permit installation of a septic tank. Such additional work may bring the total cost of sewage facilities to $1,200.00. Prior to installation of septic tanks or other on-lot sewage disposal systems, a permit must be obtained from local authorities. Buyer should determine the availability of such a permit for his lot from such authorities.

The developer has obtained a letter from the Penn Forest Township Supervisors that the use of septic tanks and other on-lot sewage disposal facilities will be approved for use in the Hickory Run Forest subdivision upon issuance of a permit. Under ordinance of the township and pursuant to rules, regulations and standards of the Penna. Department of Health, all as required under the Pennsylvania sewage facilities act, a fee of $30.00 for each permit issued under the township ordinance will be required."

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

BART M. SCHWARTZ being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 9th day of October 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

PRYOR, CASHMAN & SHERMAN
410 Park Avenue
New York, New York

And deponent further says that he sealed the said envelope and placed the same in the mail ~~drop~~ box for mailing outside at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Bart M. Schwartz

Sworn to before me this
9th day of October, 1975

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977